Supreme Court, U.S.
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No. ___

In the Supreme Court of the United States

Oscar Manuel Garcia y Garcia, Petitioner

v.

United States of America, Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Article 1 § 8 of the United States Constitution permits Congress under the Maritime Drug Law Enforcement Act to punish any transgression committed on the high seas by a foreign national on a foreign vessel.

RULE 29.6 STATEMENT

The petitioner has no parent company, and there are no publicly held companies that hold any stock of the petitioner.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is available at 2006 U.S. App. LEXIS 12040 and is reproduced in the Appendix at App. 1. The decision of the United States District Court for the Middle District of Florida is unreported and reproduced in the Appendix at App. 8.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Eleventh Circuit were entered on May 16, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case implicates the High Seas Clause of the United States Constitution. App. 23. The statute involved is United States Code, Title 46, Chapter 38, § 1903, "Maritime Drug Law Enforcement Act," reproduced in the Appendix at App.

STATEMENT

Oscar Manuel Garcia y Garcia ("Garcia"), the petitioner, is a native and citizen of Guatemala. On or about March 1, 2004, he and other crewmembers of a Guatemalan-registered ship, the El Almirante, departed from

Guatemalan waters for international waters off the coast of Costa Rica. On March 6, the U.S. Coast Guard ("USCG.") observed that the El Almirante was on an intercept course with a Colombian ship. The USCG suspected that the ships were involved in drug trafficking so they contacted the Guatemalan government to obtain permission to board the El Almirante. On March 7, 2004, after meeting with the Colombian ship and receiving its cargo, the El Almirante began its return trip to Guatemala. The USCG boarded the ship about 250 miles off the coast of Costa Rica and discovered cocaine. App. 2.

On March 16, petitioner was indicted for one count of possession with intent to distribute an illegal substance and one count of conspiracy to possess with intent to distribute an illegal substance in violation of 46 App. U.S.C. § 1903 (a), (g) and (j), the Maritime Drug Law Enforcement Act ("MDLEA"). The Guatemalan government consented to U.S. interception of the El Amirante and seizure of Garcia. He was subsequently brought to the Middle District of Florida for trial. App. 8.

In the district court, petitioner filed a motion to dismiss for lack of subject matter jurisdiction. In the motion, they argued that the U.S. Constitution does not grant Congress the authority to criminalize conduct by foreign nationals aboard foreign vessels with no meaningful connection to the U.S. The court rejected the challenge, holding the MDLEA constitutional because Congress is not limited to criminalizing behavior with a nexus to the U.S. App. 12. It also held that Art. I § 8, cl. 10 of the

U.S. Constitution ("High Seas Clause") enabled Congress to exercise jurisdiction over Garcia because drug trafficking is an "offense against the law of nations." App. 19. After the court denied the motion, petitioner entered a conditional guilty plea reserving his right to appeal and to withdraw his plea if successful on appeal. Garcia was sentenced to serve 168 months. App. 3.

On appeal, petitioner reiterated that the High Seas Clause does not authorize the MDLEA's assertion of exterritorial jurisdiction because (1) Congress's authority to define and punish felonies is limited in its extraterritorial scope and (2) drug smuggling is not a crime of "universal jurisdiction" akin to piracy, slavery, genocide, and other international law crimes. The Eleventh Circuit Court of Appeals rejected their arguments. In an unpublished opinion, it held that the MDLEA represents a constitutional exercise of power because Congress legitimately can legislate so as to protect the nation from drug trafficking given trafficking's status as a crime of "universal concern" that is "universally condemned" with a "potential adverse effect." App. 7. The court, in essence, read the High Seas Clause to empower Congress to punish as felonies any conduct aboard foreign ships committed by foreign nationals as long as the conduct is widely condemned.

REASONS FOR GRANTING THE PETITION

Article I of the Constitution vests in Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[1] The court of appeals below construed that provision to allow Congress to punish under the MDLEA any transgression committed on the high seas by a foreign national on a foreign vessel. The breadth of its apparent construction of the High Seas Clause is staggering, and the policy implications from such an interpretation, severe. If the High Seas Clause reaches conduct unconnected to the United States' relations with foreign powers, then Congress cannot only punish assaults or swindles perpetrated by one foreign national against another on a foreign ship, given that such conduct is universally condemned, it can also punish behavior that is legal within the other nation. Moreover, if Congress can punish all felonies on foreign ships, then it can punish foreign nationals on foreign ships who have more than one wife, even if permitted in their own country, or can punish those who engage in the business of gambling online in cruise ships despite the fact that such betting may be legal within their own nations. Such a reading of the Constitution is abhorrent to the law of nations, and is contradicted by the structure of Article I itself as well as by the history surrounding the Framing. This Court accordingly should review the decision below.

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[1] U.S. Const. art. I, § 8.

I. The Courts Below Erred in Imputing to the Framers a Goal of Permitting Congress to Criminalize Conduct on the High Seas Unconnected to United States' Relations to Foreign Powers.

The court below erred in construing the High Seas Clause to confer on Congress unfettered rein to determine which conduct to punish extraterritorially. As an initial matter, the court's expansive reading of the phrase "to define and punish ... Felonies" renders superfluous every other term in the clause. If Congress has plenary authority to determine which felonies to define and punish on the high seas, then the correlative powers to define and punish "Piracies" and "Offences against the Law of Nations" are redundant. Every piracy and every offence against the law of nations can be defined as a felony as well. The Framers presumably did not craft the constitutional clause with such sloppiness.

Rather, the term "felonies" should be understood more narrowly to refer to conduct directly affecting the United States' relations with other nations, distinct from the categories of "piracy" and "offenses against the law of nations." The cognate powers to define and punish "Piracies" and "Offences against the Law of Nations" refer to two cabined categories of offences against all civilized nations recognized in 1789. The inclusion of "felonies" afforded Congress the power to define and punish additional conduct not rising to the level of universal crimes that directly threatened the U.S.'s relations with other nations, whether

arson by a U.S. citizen on a foreign ship or efforts by a foreigner on a foreign ship to smuggle goods into the United States.

Piracy and offenses against the law of nations entailed conduct that every civilized nation had an obligation to punish. "Piracies" included depredations by those on stateless vessels against shipping of all nations. At the time of the Founding and afterwards, pirates wrecked havoc with trade among the nations. Similarly, offences against the Law of Nations consisted of only a few actions that all civilized nations viewed as lawless and that threatened the fabric of civilized nations. In Blackstone's words, that category represented offences "more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another."[2] The offences did not have to do with wrongs within another nation, but with wrongs to the "intercourse which must frequently occur between two or more independent states."[3] Blackstone concluded that the principal offences against the Law of Nations were 1) violation of safe conducts; 2) infringement of the rights of ambassadors; and 3) piracy.[4]

Offenses against the law of nations have expanded since the time of the Founding, but only modestly. Genocide and slavery are now

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[2] V William Blackstone, *Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia* 66 (St. George Tucker, 1803).

[3] *Id.*

[4] *Id.* at 68.

included within the commonly understood category of offenses against the law of nations. Offenses such as murder, kidnapping, rape, and robbery, however, are not.[5] There is scant support for the district court's assertion that drug dealing also should be included within such offenses. To be sure, most drug trafficking is condemned widely, even though some groups around the world ingest controlled substances as part of their religious practices. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (addressing use of hoasca); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (addressing use of peyote). Yet, narcotics trafficking does not pose the same threat to discourse among the nations as does genocide, piracy, or slave trading. Indeed, some nations punish drug trafficking quite modestly in contrast to the previously recognized offenses against the law of nations.[6] The courts below did

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[5] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the U.S. § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.").

[6] For instance, Sweden's Narcotics Drugs (Punishments) Act 1986 § 1 permits imprisonment for no longer than three years for drug-related offenses. Translation of Swedish text at March 1997 U.N.ODC-E/NL. 1999/25. Such modest sentences do not reveal support for the lower courts' conclusion that drug trafficking is an offence against he law of nations. Sweden's policy is not an aberration. Finland (http://www.dpna.org/resources/trends/changingface.htm), Switzerland (4 Ind. Int'l & Comp. L. Rev. 277), and Holland (*Id.*) also punish drug trafficking comparatively leniently. No consensus as to the seriousness of the offense has emerged.

not point to any international consensus that drug trafficking be included as one of the few crimes recognized as offenses against the law of nations. Terrorism, perhaps, should be added to the list but not drug trafficking. Thus, the categories of offenses against the law of nations and piracy narrowly cover conduct antithetical to relations among civilized nations.

By contrast, the Framers included the category of "felonies" to ensure that Congress could define and punish serious transgressions on the high seas by anyone – particularly U.S. citizens – whose conduct directly threatened to disrupt our nation's relations with foreign powers.[7] But for addition of that phrase, Congress would not have had the power to punish a U.S. citizen committing murder on the high seas aboard a foreign ship that, if not punished, might spark international tensions, or foreign citizens on foreign ships who attempted to prevent their ships from reaching our shores.

The High Seas Clause therefore fulfills the function of empowering Congress to prevent acts that threaten our nation's relations with other powers. The only "felonies" included are those that threaten to disrupt such relations. In the Federalist Papers, Madison ascribed to the Framers the purpose of "regulat[ing] the intercourse with foreign nations."[8] St. George

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[7] At the time, all felonies were punishable by death. *See* V Blackstone, *supra*, note 2, at 66. The Founders, therefore, did not by dint of that term empower Congress to punish lesser offenses.

[8] *The Federalist* No. 42 (James Madison) 264 (New American Library 1961). Under the Constitution, Congress does not enjoy a free hand to criminalize whatever behavior it finds

Tucker soon thereafter concluded in his edition of Blackstone, "The true ground of granting these powers to congress seems to be, the immediate and near connection and relation which they have to the regulation of commerce with foreign nations, which must necessarily be transacted by the communication on the high seas."[9] And, Justice Story, in his Commentaries, wrote that

> "[i]t is obvious, that this power has an intimate connection and relation with the power to regulate commerce and intercourse with foreign nations . . . Congress ought to possess the power to define and punish all such offences, which may interrupt our intercourse and harmony with, and our duties to [foreign nations]."[10]

With the High Seas Clause, the Framers vested in Congress the power to prevent acts on the High Seas that might embroil us in international conflict. Insertion of the category of "felonies" was never considered a blank check for Congress

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immoral or contrary to the public good. In the domestic context, Congress can criminalize conduct only if it is tied to the Commerce Clause or some other textual power. Similarly in the High Seas Clause, the Framers vested Congress only with the power to criminalize conduct with a connection to the United States' relations to foreign relations, whether committed by pirates belonging to stateless vessels or U.S. citizens on the high seas.

[9] 1 Blackstone, *supra* note 2, at App. 268-9.

[10] Joseph Story, *Commentaries on the Constitution of the United States*, vol. II, book 3, ch. 20, § 1165, 1185 (4th ed., Little, Brown, and Company 1873).

to reach extraterritorially when defining and punishing crime.

The construction of the courts below would turn the Framers' intent on its head. Under their interpretation, the Clause empowers Congress to intrude into the internal affairs of other countries by criminalizing conduct by foreign nationals on their own ships, at least as long as the conduct is widely condemned. Such a construction invites not harmony among the several nations, but conflict.

Given the historical setting, it is difficult to believe that the Framers wished to empower Congress to punish transgressions on French or British ships that had little connection to the United States. In 1789, relations with both nations were fraught with danger, and much of the Constitution is crafted so as to minimize the potential for friction with other countries. The Framers vested jurisdiction over cases involving ambassadors, for instance, only in this Court[11] to lessen the chance that a slight could provoke an international incident. Granting Congress the power to punish crimes committed by British subjects on British ships would have been an affront, particularly because, as petitioner discusses *infra* at 15-16, such jurisdiction had not been asserted by Great Britain. And, such felonies, unlike with cases involving ambassadors, could have been tried in any of the several states, barring a congressional decision to vest exclusive jurisdiction over such conduct in the federal courts.

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[11] U.S. Const. art. III, § 2.

Thus, the High Seas Clause should be construed to permit congressional assertion of criminal jurisdiction over conduct threatening harm to our nation's relations with foreign countries, whether because of unprincipled acts of our own citizens or foreigners. This Court has yet had occasion to determine how close the connection between the conduct on the high seas and the United States must be. For piracy, the threat to relations among all countries is sufficient. For crimes against the law of nations, the conduct must fall within the narrowly recognized category of crimes, as discussed previously.[12] For "felonies" not falling within the other two categories, the link to our relationship with a foreign nation must be palpable. Assault or fraud committed by foreign nationals against others on foreign ships does not suffice. Neither does smuggling of contraband such as the controlled substances in this case, absent any reason to believe that the cargo was headed for U.S. shores. (Indeed, many of the Framers had themselves engaged in smuggling in years prior to the Founding.).[13] No specific nexus was demonstrated between the shipment in this case and U.S. relations with foreign nations.

Finally, the fact that Guatemala consented to the U.S. boarding of its ship in no way permits Congress to regulate conduct that it otherwise

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[12] Restatement, *supra*, note 5.

[13] George C. Thomas, III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 156 (2001); Louis B. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. Pa. L. Rev. 157, 158 (1954).

could not. Another nation's consent for the United States to enforce the United States' laws in that nation's territory (even had that been the case here)[14] cannot confer on Congress power that the Constitution withholds The Constitution no more allows Congress to criminalize conduct by Guatemalans in Guatemala upon Guatemala's consent than it does to criminalize conduct by citizens of Illinois in Illinois upon Illinois' consent, when that conduct otherwise falls outside Congress's limited powers in Article I of the Constitution. The foreign nation's consent may remove an international law objection to the exercise of criminal jurisdiction, but it cannot alter the constitutional framework.[15]

Although this Court has not previously examined the scope of Congress's power under the High Seas Clause, it analyzed closely related issues involved in a series of cases that arose under the 1790 Act punishing crimes on the high seas. The decision in *United States v. Palmer*, 16 U.S. 610 (1818), arose from an indictment issued against a foreign national

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[14] There is nothing explicitly in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances authorizing signatories to apply the law of the ship boarding the vessel suspected of narcotics trafficking. Rather, the treaty provides only that the boarding vessel may "take appropriate action with respect to the vessel, persons and cargo on board." United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature Dec. 20, 1988, art. 17 § 4(c).

[15] It is axiomatic that parties cannot, through consent, add to the jurisdiction of courts. *See Swift & Co. v. U.S.*, 276 U.S. 311, 314 (1928) ("Consent cannot confer jurisdiction to act outside the judicial power.").

accused of robbery on the high seas aboard a foreign vessel. Chief Justice Marshall noted "it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government . . . These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." *Id.* at 632. He acknowledged that the statute prohibiting robbery on the high seas applied to "any person," but reasoned that the words should be limited to apply "to those objects to which the legislature intended to apply them." *Id.* at 631. Thus, in light of background norms, Chief Justice Marshall construed "any person" to exclude foreign nationals and cover instead "any person or persons owing permanent or temporary allegiance to the United States." *Id.* Justice Johnson in a separate opinion echoed that "Congress can inflict punishment on offenses committed on board the vessels of the United States, or by citizens of the United States, anywhere; but Congress cannot make piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses." *Id.* at 641-42.[16] The Court clarified in *United States v. Klintock*, 18 U.S. 144 (1820), that Congress could exercise jurisdiction not only over U.S. citizens but also over foreign nationals serving on stateless vessels, given that

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[16] Justice Johnson also noted that, because robbery was not then punished by death in the United States, Congress could not include it within the "felonies...on the high seas" clause. In using the term "felonies," the Framers limited Congress's power to reach only the most serious transgressions on the high seas. *Palmer*, 16 U.S. at 639.

it was every nation's duty to punish transgressions on stateless vessels.

Furthermore, this Court in *United States v. Furlong*, 18 U.S. 184 (1820), considered the question whether Congress, under the pertinent statutes, could punish an Irish national accused of murdering a British national aboard a British ship: "whether murder committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner, upon a foreigner." *Id.* at 194. The Court stated that it would interpret the statute narrowly in light of Congress's limited power to legislate over foreign nationals, and therefore exclude "the punishment for murder to the case of that offense committed by a foreigner upon a foreigner in a foreign ship." *Id.* at 196. Indeed,

> if, by calling murder piracy, [Congress] might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by that same device? The most offensive interference with the governments of other nations might be defended on the precedent. *Id.* at 198.

Although the Court's resolution of the issues in *Furlong* and *Palmer* turned on interpretation of the 1790 statute, both decisions also rested firmly on an understanding the High Seas Clause itself.

Contemporary commentators understood *Furlong* and *Palmer* in the same vein. Wheaton

in his *Elements of International Law*[17] stated that "The crimes of murder and robbery, committed by foreigners on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs."[18] And, William Rawle in his constitutional treatise soon thereafter wrote that the High Seas Clause did not vest Congress with the power to punish "the citizens or subjects of a foreign state sailing under its flag."[19] Rather, the Constitution permitted Congress to punish those "acting in defiance of all law, and acknowledging obedience to no government."[20]

The circuit court's subsequent decision in *United States v. Kessler*, No. 15, 528 (C.C.D. Pa. 1829), similarly reveals early judicial understanding of the High Seas Clause. There, the court reviewed an indictment for robbery against the master of a French ship. The judge charged the jury that, if the accused was a foreign national and committed a crime against another foreign national on a foreign ship, "such a case is not cognizable by the courts of the United States." *Id.* at 770. The judge continued that, otherwise,

> [i]t is easy to see that this might get us into difficulties with other nations, who may not choose that we should

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[17] Henry Wheaton, *Elements of International Law*, Part Second, Ch. 2, § 124, 164 (George Grafton Wilson ed., lit. reprod. 1866 ed., Clarendon Press 1936).

[18] *See also* II Moore's International Law Digest § 202, at 264 (1906) (citing Wheaton with approval).

[19] William Rawle, *A View of the Constitution of the United States*, 106-09 (2d ed., Philadelphia 1829).

[20] *Id.*

> hang their subjects by the mode of trial and sentence of our tribunals, for offences on board their own ships under their authority and protection. They may choose to be themselves the judges of the guilt of the accused, and of the measure of the punishment. ... Questions and difficulties of this sort are avoided by confining our cognizance of offenses on the high seas to our own ships, leaving other nations to take care of their own. *Id.* at 774.

The British Court in *Queen v. Keyn* later in that century went even further in holding that it had no jurisdiction over an alleged manslaughter perpetrated by a German national aboard a German vessel some three miles from the British coast. 1876 L.R. 2ex. D. 63, 63. Although some of the judges believed that jurisdiction existed over conduct within a three-mile territorial limit, they all concurred that no jurisdiction would have existed had the manslaughter been committed on the High Seas. Indeed, Lord Phillimore stated that as of 1879, he was "not aware of any instance, none was cited to us, of the exercise of criminal jurisdiction over a foreign vessel for an offence committed when she was not within a port or harbour of the inland waters of the realm." *Id.* at 67-68. He concluded that "the Court had no jurisdiction over this foreigner for an offence committed on board a foreign ship on the high seas, though within three miles of the coast; that he is governed by the law of the state to which his flag belongs; and that the conviction cannot be

sustained."[21] *Id.* at 86. Judge Kelly reiterated that "not one single instance of the exercise of [jurisdiction over subjects of other nations on foreign ships on the high seas] is to be found in the history of the world from the beginning of time" *Id.* at 151. Finally, of critical importance to this case, Judge Lindley wrote that "[t]his brings us at once to the consideration of the limits of the legislative power of this country and of the jurisdiction of its Courts . . . No state has any power to legislate save over its own subjects and over persons on board ships carrying its flag." *Id.* at 89. In crafting the Constitution, the Framers were unlikely to confer more power on Congress than Parliament had ever exercised.

Moreover, respondent's own analysis of the MDLEA's predecessor, the Marijuana on the High Seas Act, similarly highlights the prior consensus that the High Seas Clause affords Congress authority only over conduct directly threatening the United States' relations with another power. One congressional proposal suggested extending the nation's criminal jurisdiction to reach noncitizens on foreign vessels. Assistant Attorney General Patricia Wald on behalf of the Justice Department wrote that the bill "encompass[ed] foreign vessels as well as stateless vessels and vessels within the customs water of the United States. This raises

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[21] *See also Regina v. Bjornsen*, 1865 LE & CA 545 (asserting that Court had no jurisdiction over manslaughter on the High Seas unless the vessel was British); *Regina v. Kohn*, 1864 4F & F 68 (instructing the jury that "the prisoner could not be indicted in the this country [for scuttling a vessel on the high seas] as he is a foreigner, and the ship was foreign, and the offense was committed on the high seas."

questions of criminal jurisdiction over foreign nationals and foreign vessels. Under international law, a state does not have jurisdiction to proscribe the conduct in question."[22] She continued that "[t]o have jurisdiction over possession, manufacture, or distribution of controlled substance by a non-U.S. citizen on foreign vessels on the high seas, the United States must show an actual or potential adverse effect within its territory."[23] Similarly, Mark Aron, acting general counsel of the Department of Transportation, wrote that "international law considerations require some nexus to the United States before we can apply our statutes."[24] He rejected the argument that the flag state's consent provided a sufficient basis for jurisdiction, noting that drug trafficking could not be considered a crime against the law of nations.[25] In light of such testimony, Congress narrowed the jurisdictional provisions of the Marijuana on the High Seas Act to regulate only with respect to "vessels subject to the jurisdiction of the United States,"[26] which – in the views of a number of courts of appeals – excluded vessels flying under foreign flags as in this case.[27]

In its zeal to combat drug smuggling, Congress through the MDLEA abandoned the learning of *Palmer*, *Furlong*, British precedent, and the debates culminating in the limitation in

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[22] H.R. Rpt. No. 96-323 at 16 (July 10, 1979) (Letter to Chairman, Committee on Merchant Marine and Fisheries).
[23] *Id.*
[24] *Id.* at 19.
[25] *Id.* at 20.
[26] 21 U.S.C. § 955(b)(d).
[27] *See* pages 20-21 *infra*.

the Marijuana on the High Seas Act. Congress sought to regulate conduct by foreign nationals not only on stateless vessels, but also on foreign vessels themselves without any tie to the United States. That expansion of jurisdiction not only flies in the face of international law, but violates Article I's limitation of congressional power to define felonies only in connection with the United States' relations with other countries. Accordingly, this Court should grant the petition to review whether the Constitution confers on Congress the power so profoundly to regulate conduct by foreign nationals on foreign ships.

II. This Court Should Resolve the Conflict in the Courts of Appeals Over Whether a Nexus Must be Established Between the Defendants' Conduct and the United States.

This Court should grant certiorari to resolve the conflicts that have beset the courts of appeals in construing both the MDLEA and its predecessor, the Marijuana on the High Seas Act. There have been a number of circuits that, in agreement with the Eleventh Circuit, hold that the Constitution affords Congress the power to exercise criminal jurisdiction over conduct by foreign nationals aboard foreign ships. See, e.g., *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002); *United States v. Perez-Oviedo*, 281 F.3d 400 (3d Cir. 2002); *United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999).

On the other hand, the above approach clashes with the recent decision of the Ninth Circuit in *United States v. Perlaza*, 439 F.3d

1149 (9th Cir. 2006). There, the court reversed the convictions of defendants under the MDLEA because the prosecution had failed to prove a nexus between the defendants' activities and the United States. *Id.* at 1169. In parallel with the argument raised in this petition, although relying on the Fifth Amendment, the court reasoned that "due process requires the Government to demonstrate that there exists 'a sufficient nexus between the conduct condemned and the United States' such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant." The court continued that "[t]he fact the Government received Colombia's consent to seize the [defendants] . . .does not eliminate the nexus requirement. . . . [Rather], [f]or a United States court to properly exercise jurisdiction, the Government still needs to establish some detrimental effect within, or nexus to, the United States." *Id.* at 1170.

Similarly, the district court in *United States v. Greer*, 956 F. Supp. 531 (D. Vt. 1997), articulated the same reasoning that the Ninth Circuit was to adopt in *Perlaza*. The court stated that "[i]nternational law principles suggest that some nexus to the United States must be shown, in order for the United States to assert jurisdiction over criminal conduct occurring on a foreign vessel in foreign territorial waters." *Id.* at 535.

The conflict among the circuits over extraterritorial enforcement of United States drug laws has been evident for more than twenty years. Under the Marijuana on the High Seas Act, the Second, Third, Fifth, and Ninth circuits

were in agreement that a nexus between the United States and the conduct at issue must exist in order for the United States to have jurisdiction over foreign citizens on foreign vessels in international waters. *United States v. Pinto-Mejia*, 728 F.2d 248, 260 (2nd Cir. 1983); *United States v. Wright-Barker*, 784 F.2d 161, 168-169 (3d Cir. 1986); *United States v. Alvarez-Mena*, 765 F.2d 1259, 1264 (5th Cir.1985); *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987).

Other courts, however, construed even the more limited language of the Marijuana on the High Seas Act to permit Congress to reach conduct by foreign nationals on foreign ships. They relied on consent of the flag-nation to provide the requisite nexus. *United States v. Robinson*, 843 F.2d 1, 2 (1st Cir. 1988); *United States v. Gonzalez*, 776 F.2d 931, 935-936 (11th Cir. 1985).

Thus, no consensus exists as to whether a nexus must be demonstrated prior to assertion of extraterritorial jurisdiction of our drug laws to foreign nationals on foreign ships. Accordingly, this Court should grant certiorari to resolve the disparate approaches among the lower courts. At a minimum, this Court should hold this case pending resolution of the petition that respondent is likely to file in *Perlaza*.

III. Permitting Congress to Regulate Foreign Nationals on Foreign Ships May Lead to Dire Foreign Policy Repercussions

The *Garcia* decision places the nation on a path to becoming a global policeman. According to the court, the Constitution empowers Congress to criminalize all conduct on the high seas irrespective of the lack of connection to our relations with foreign states.

The *Garcia* reasoning encourages other countries to apply their own definitions of and punishments for felonies on the high seas to U.S. citizens. Because the definition and scope of a "felony" varies from country to country, *Garcia* could validate prosecutions of American citizens in foreign courts for conduct on the high seas as wide-ranging as drug-trafficking, whaling, or gambling. Consider a United States citizen gambling aboard a Carnival Cruise ship sailing in international waters. *Garcia* could conceivably pave the way for a foreign nation that considers gambling a felony, as many Arab nations do, to arrest and try that citizen. Jason Morgan-Foster, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context*, 10 ILSA J. Int'l & Comp. L. 35, 64 (Fall 2003).

Moreover, not only is application of other nations' laws to U.S. citizens on the high seas disquieting, so is the prospect of punishment under other nations' legal systems. Trial

protections are far less robust, and conditions in prisons abroad are generally far less savory. The reasoning of the courts below, if applied by other countries, could result in sentences and confinement for our citizens that many would find unpalatable.

Indeed, it is ironic that courts in this country are expanding our own nation's extraterritorial assertion of criminal jurisdiction at the same time that the administration has protested other nations' exercise of broad jurisdiction over crimes occurring outside their jurisdictions. President Bush excoriated Belgium for its purported exercise of criminal jurisdiction over acts that occurred in Lebanon and Congo.[28] The threat to United States interests was not fanciful – individuals in that forum presented claims against President Bush, Vice President Cheney, and former Secretary of State Colin Powell for conduct unrelated to Belgium.[29] Indeed, Secretary of Defense Donald Rumsfeld threatened to move NATO's headquarters from Brussels if Belgium persisted in exercising such broad criminal jurisdiction.[30] Moreover, this administration refused to support establishment of an International Criminal Court, expressing discomfort with the concept of the new court's assertion of jurisdiction over United States citizens. See generally Diane F. Orentlicher, *Unilateral Multilateralism: United*

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[28] "US presses Belgium over law on pursuing foreigners: report," Agence France-Press, Jan. 11, 2003.

[29] Donald Rumsfeld, Briefing (NATO Headquarters, Brussels, June 12, 2003) (copy on file with *Federal Information and News Dispatch, Inc.*).

[30] *Id.*

States Policy Toward the International Criminal Court, 36 Cornell Int'l. L.J. 415 (2004). Granting the petition is therefore warranted to consider whether our Constitution permits Congress to exercise such broad jurisdiction over foreign nationals on foreign ships.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari or, in the alternative, hold the petition pending the outcome in *Perlaza*.

Respectfully submitted,

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APPENDIX

No. 04-16247

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADELSO TORRES GARCIA and OSCAR MANUEL GARCIA Y GARCIA, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

May 16, 2006, Decided
May 16, 2006, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For Adelso Torres Garcia, Appellant: Tiffany Shantel Craig, Law Office of Tiffany S. Craig, TAMPA, FL.

For United States of America, Appellee: David Paul Rhodes, United States Attorney's Office, TAMPA, FL.

JUDGES: Before BIRCH, BLACK, and BARKETT, Circuit Judges.

OPINION:
PER CURIAM:
Adelso Torres Garcia ("Torres") and Oscar Manuel Garcia y Garcia ("Garcia") appeal their convictions for possession with intent to distribute cocaine while aboard a vessel subject

to the jurisdiction of the United States. The Piracies and Felonies on the High Seas Clause of the Constitution ("the High Seas Clause") granted Congress the power to define and punish offenses committed on the high seas, and we have not required a nexus between the United States and offense conduct under the Maritime Drug Law Enforcement Act ("MDLEA") or its predecessor statute. We AFFIRM their convictions.

I. BACKGROUND

Torres and Garcia were indicted for, inter alia, possession with intent to distribute cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 App. U.S.C. § 1903(a), (g), and 21 U.S.C. § 960(b)(1)(B)(ii). R1-1 at 1-3. Garcia and Torres, who are both natives and citizens of Guatemala, were aboard the "El Almirante," a Guatemalan registered boat, which the U.S. Coast Guard intercepted and boarded in international waters. The Coast Guard discovered more than 2,500 kilograms of cocaine aboard the El Almirante.

Garcia and codefendant Erick Armando Aguilar Ramirez filed a "Motion to Dismiss the Indictment for Lack of Subject Matter Jurisdiction"; Torres adopted the motion. R1-101, 112, 119. In the motion, Garcia argued that Congress exceeded its powers by enacting the MDLEA, under which it purported to criminalize drug smuggling by foreign nationals aboard foreign vessels. Following a hearing, the district court denied the motion. R1-140. Specifically, the district court found that Congress's enactment of the MDLEA was a constitutional exercise of power pursuant to the Clause, and,

while the Clause did not give Congress the power to criminalize all conduct on the high seas, it also did not limit Congress's extraterritorial power as to those felonies only with a nexus to the United States. Id. at 2-8. The district court also found, however, that drug trafficking constituted an offense against the law of nations, and thus empowered Congress to criminalize it pursuant to the Clause. Id. 9-11.

Garcia and Torres subsequently entered conditional guilty pleas, reserving their rights (1) to appeal the denial of their motion to dismiss the indictment, and (2) if successful on appeal, to withdraw their pleas. Torres was sentenced to serve a term of imprisonment of 135 months, and Garcia was sentenced to serve 168 months.

On appeal, they argue that Congress exceeded its constitutional authority by punishing offenses committed in international waters by foreigners aboard a foreign vessel and that Congress's authority was limited to criminalizing certain offenses.

II. DISCUSSION

Torres contends that (1) the only source of constitutional authority for the Maritime Drug Law Enforcement Act is the High Seas Clause, which granted Congress the authority to define and punish piracy, felonies, and offenses against the law of nations committed on the high seas; (2) the meanings of "felonies" and "piracy" within the High Seas Clause are not synonymous; and (3) the authority to define and punish felonies is more limited in its extraterritorial scope than the authority to punish piracy. Appellant Torres' Brief at 4-6. Specifically, he asserts that, because

piracy is the only "universal jurisdiction" offense, only piracy may be punished regardless of the nexus between the United States and the offender or the vessel. Id. at 6-8. Next, he argues that the purpose of the High Seas Clause was not to give Congress "general legislative authority over international waters," but to vest authority over United States vessels and nationals in the federal, rather than state, government. Id. at 8-9. Finally, Torres asserts that drug smuggling is not a universal jurisdiction offense because (1) it is not an international law crime, (2) it is not so shocking that it makes all jurisdictional limits moot, (3) only war crimes, genocide, and piracy are universal jurisdiction offenses, and (4) Congress, when enacting the MDLEA, did not expressly declare that it was legislating under its power to define international law offenses.

Garcia asserts that Congress has the authority to criminalize only the following offenses occurring on the high seas: (1) piracy, as universally defined; (2) felonies committed by a person aboard a stateless vessel; and (3) felonies committed by or against a United States citizen. He contends that a vessel flying a foreign flag remains under the jurisdiction of that nation, which Congress has no authority to legislate. He asserts that the High Seas Clause was intended only to ensure that American citizens traveling on the high seas were subject to uniform criminal laws. Garcia also notes that those cases upholding the MDLEA's predecessor statute all dealt with stateless vessels. He then compares the nexus requirement imposed by due process principles with that imposed by the High Seas Clause, noting that they are distinct concepts and that other courts' discussions of due process requirements do not necessarily inform the

analysis here. Next, Garcia argues that the "protective principle" of international law, which we have held provides a basis for the extraterritorial application of the MDLEA, also requires a nexus between the offense conduct and the United States. Appellant Garcia's Brief at 25-26. Finally, he asserts that drug smuggling is not an offense against the law of nations as it is private conduct which cannot constitute such an offense.

"We review the constitutionality of a statute de novo." United States v. Ballinger, 395 F.3d 1218, 1225 (11th Cir. 2005) (en banc). The MDLEA makes it "unlawful for any person on board a vessel . . . subject to the jurisdiction of the United States . . . to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance." 46 App. U.S.C.A. § 1903(a). A vessel subject to the jurisdiction of the United States is defined as, inter alia, "a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States." Id. at § 1903(c)(1)(C).

The High Seas Clause grants Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. While we have not addressed the precise question raised here and while there is little case law interpreting the scope of the High Seas Clause, other circuits have upheld the constitutionality of the MDLEA. Without specifically discussing the High Seas Clause's limits, the Ninth Circuit held that the MDLEA was a constitutional exercise of Congressional

power pursuant to the High Seas Clause. United States v. Moreno-Morillo, 334 F.3d 819, 824 (9th Cir. 2003) (citing United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990), and United States v. Aikins, 946 F.2d 608, 613 (9th Cir. 1990)). The Third Circuit also held that the High Seas Clause provided Congress with the authority to enact the MDLEA and criminalize drug trafficking on the high seas, regardless of whether a nexus to the United States existed. United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056, 28 V.I. 365 (3rd Cir. 1993).

We have previously rejected the argument that the MDLEA is unconstitutional because the conduct at issue lacks a nexus to the United States. United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035, 124 S. Ct. 2110, 158 L. Ed. 2d 720 (2004); see also United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982) (holding that the predecessor statute to § 1903, 21 U.S.C. § 955a, did not require a nexus between stateless vessels and the United States). We have also observed that Congress has power to enact legislation pursuant to the "protective principle" of international law. United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985). "Universal jurisdiction is a doctrine of international law allowing states to define and punish certain crimes considered to be of 'universal concern.'" Herero People's Reparations Corp. v. Deutsche Bank, A.G., 361 U.S. App. D.C. 468, 370 F.3d 1192, 1196 (D.C. Cir.), cert. denied, 543 U.S. 987, 125 S. Ct. 508, 160 L. Ed. 2d 371 (2004). In contrast, the protective principle "permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere

with the operation of its governmental functions." Gonzalez, 776 F.2d at 938. "The protective principle does not require that there be proof of an actual or intended effect inside the United States. The conduct may be forbidden if it has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems." Id. at 939. Congress enacted the MDLEA because drug trafficking aboard vessels (1) "is a serious international problem and is universally condemned" and (2) "presents a specific threat to the security and societal well-being of the United States." 46 App. U.S.C. § 1902. For these reasons, Congress could properly enact the MDLEA under the Constitution.

III. CONCLUSION

Because the High Seas Clause granted Congress the power to define and punish offenses committed on the high seas and because we have not required a nexus between the United States and the offense conduct under the MDLEA or its predecessor statute, we affirm the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	**Case No.**
vs.	)	**8:04-**
	)	**CR-109-T-**
OSCAR MANUEL GARCIA Y GARCIA	)	**27TBM**
ERICK ARMANDO AGUILAR RAMIREZ	)	
ADELSO TORRES GARCIA	)	
CESAR CRUZ-TORRES		

ORDER

BEFORE THE COURT is Defendants' Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 101) and the Government's Response in Opposition (Dkt. 108). Defendant's motion is DENIED.

Defendants, all non-U.S. citizens, were arrested by the United States Coast Guard while on board the Guatemalan-flagged F/V El Almirante and what was believed to be an intercept course with a Columbian-flagged vessel. That vessel had been observed outside any authorized Columbian fishing zone and was suspected of being engaged in drug trafficking activities. After obtaining consent from the Government of Guatemala, the Coast Guard boarded the El Almirante and found a large quantity of cocaine. Defendants were indicted and charged with violations of the Maritime Drug

Law Enforcement Act (MDLEA), 46 U.S.C. § 1901-1904.[1]

The narrow issue presented by Defendant's motion to dismiss is whether Congress, in enacting the MDLEA, 46 U.S.C. App. § 1903, exceeded its constitutional authority by punishing offenses committed on the high seas by foreigners on board a foreign vessel. Upon consideration, this Court concludes that enactment of the MDLEA was a constitutional exercise of congressional power pursuant to Article 1, Section 8, Clause 10 of the United States Constitution, known as the "Piracies and Felonies Clause."

Specifically, Congress has the authority to define and punish drug trafficking as a felony committed on the high seas pusuant to Clause 10. Unites States v. Martinex-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993); United States v. Suerte, 291 F.3d 366, 372-75 (5th Cir. 2002); United States v. Moreno-Morillo, 334 F.3d 819, 824-25 (9th Cir. 2003); United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990), *cert. denied*, 498 U.S. 407 (1991), United States v. Rendon, 354 F.3d 1320, 1326 (11th Cir. 2003)("...[B]y enacting § 1903(f), Congress exercised its established authority 'to regulate drug-related activities on the high seas.'" (citing Tinoco v.

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[1] 46 U.S.C. § 1903(a) provides in pertinent part: "It is unlawful for any person on board a vessel...subject to the jurisdiction of the United States...to knowingly...possess with intent to...distribute, a controlled substance. A "vessel subject to the jurisdiction of the United States" includes a "vessel registered in a foreign nation where a flag nation has consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. App. § 1903(a)(1)(C).

United States, 304 F.3d 1088, 1110 n. 21 (11th Cir. 2002))[2] Likewise, Courts have recognized Congress' power to punish drug trafficking on the high seas pursuant to the Piracies and Felonies Clause when rejecting challenges to the MDLEA's predecessor, 21 U.S.C. § 955a. United States v. Alvarez-Mena, 765 F.2d 1259, 1265, n. 9 (5th Cir. 1985); United States v. Smith, 680 F.2d 255, 257 (1st Cir. 1982), *cert denied*, 459 U.S. 1110 (1983).

As noted by the Eleventh Circuit: "Congress enacted the MDLEA because drug trafficking aboard vessels (1) 'is a serious international problem and is universally condemned,' and (2) 'presents a specific threat to the security and societal well-being of the United States.' Rendon, 354 F.3d at 1325, n. 2 (citing 46 U.S.C. § 1902). Given these precedents and those Congressional findings, Defendants' argument that Congress had no constitutional authority to criminalize drug smuggling by foreign nationals on foreign vessels must be rejected.

The MDLEA was enacted pursuant to the Piracies and Felonies Clause of Article I, Section 8, Clause 10 of the Constitution, which authorizes Congress to "define and punish

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[2] In United States v. Gonzalez, 776 F.2d 931, 938-39 (11th Cir. 1985), the Eleventh Circuit upheld the predecessor statute to the MDLEA, 21 U.S.C. § 955a, concluding that "...[T]he United States could prosecute foreign nationals on foreign vessels under the 'protective principle' of international law..., which permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operations of its governmental functions."

Piracies and Felonies committed on the high Seas." United States v. Alvarez-Mena, 765 F.2d 1259, 1265, n. 9 (5th Cir. 1985); United Staes v. Aikins, 946 F.2d 608, 613 (9th Cir. 1990); United Staes v. Moreno-Morillo, *supra*; United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993). That clause is the only specific grant of power in the Constitution for the punishment of criminal offenses outside the territorial limits of the United States. Suerte, 291 F.3d 375. In that regard, Congress' intent in enacting the MDLEA is clear. The MDLEA expressly provides that it is "intended to reach acts ...outside the territorial jurisdiction of the United States." 46 U.S.C. App. § 1903(h).[3]

Defendants correctly argue that Clause 10 does not empower Congress to criminalize *any*

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[3] The Court agrees with the Government that congressional intent with regard to the MDLEA is not relevant in determining the scope of congressional power under Clause 10. It is apparent, however, that Congress, in enacting the MDLEA, was sensitive to its limited extraterritorial constitutional powers when it provided that the MDLEA would be applied only to those persons on board a vessel subject to the jurisdiction of the United States. As noted in United States v. Suerte, *supra*:

> The MDLEA represents an extremely limited exercise of [the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations]. For certain persons not aboard United States vessels or in United States customs waters, it proscribes drug trafficking only aboard a stateless vessel, or as in the case at hand, a vessel whose flag nation consents to enforcement of United States law.

291 F.3d at 377.

felonious conduct on the high seas.[4] Defendants acknowledge, however, that reference to the "high Seas" in Clause 10 "obviously gives Congress *some* power to legislate extraterritorially." (Dkt. 102, p. 3). Defendants further acknowledge that the MDLEA limits its reach to U.S. national, U.S. vessels or vessels subject to U.S. jurisdiction. 46 U.S.C. § 1903(a). Defendants' argument is simply that Clause 10 does not grant Congress the power to punish foreigners engaged in drug trafficking on the high seas while on board a foreign flagged vessel. Relying on early Supreme Court precedent, Defendants argue that Congress has no constitutional power to punish felonies committed on the high seas such as drug trafficking, absent a national connection. (Dkt. 102, p. 1). Defendants' arguments, while enjoying at least some indirect scholarly support, is simply misplaced.[5] The plain language of Clause 10 includes no such limitation or condition on Congress' extraterritorial reach. Indeed, Eleventh Circuit precedent requires no nexus with the United States in a prosecution under the MDLEA. Rendon, 354 F.3d at 1325.[6]

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[4] See Martinez-Hidalgo, 993 F.2d at 1056 ("We, of course, are not suggesting that there is not limitation on Congress' power to declare that conduct on the high seas is criminal and is subject to prosecution under United Sates law. To the contrary, we acknowledge there might be a due process problem if Congress provided for the extraterritorial application of United States law to conduct on the high seas without regard for a domestic nexus if that conduct were generally lawful throughout the world. But that is not the situation here."

[5] See mark Weisburd, *Due Process Limits on Federal Extraterritorial Jurisdiction?*, 35 COLUM.J.TRANSNAT'L L. 379, 419-420 (1997).

[6] While there might be due process limitations on Congress' power to punish conduct on the high seas pursuant to

Clause 10 grants Congress the power to criminlize (1) piracy, (2) felonies and (3) offenses against the law of nations, three distinct categories of conduct. United States v. Smith, 19 U.S. 153 (1820). Defendants argue that the cases which have upheld the MDLEA as constitutional exercise of congressional power granted by the Piracies and Felonies Clause have failed to distinguish between piracy and felonies. They argue that those decisions, by failing to specify whether drug smuggling is a piracy or a felony, have effectively blurred any distinction and therefore have never reached the narrow issue they present, whether drug trafficking on the high seas by foreigners on board foreign vessels is within the jurisdictional reach of Congress. Contrary to Defendants' argument, this Circuit, as well as other Circuits, have squarely addressed the issue. See United States v. Rendon, *supra*, and cases cited *infra*. Defendants' argument that those decisions interpreted only *statutory* jurisdictional requirements is disingenuous, considering the context in which those challenges to the MDLEA have been made and the resolution of those challenges by those courts. Those decisions simply reference Congress' source of power to legislate extraterritorially pursuant to the "Piracies and Felonies Clause" without dissecting that clause into its obvious components, and unnecessary exercise given the historical distinction between piracy and other felonies. Indeed, a brief examination of relevant

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Clause 10, that issue is for another day, as due process challenges to the MDLEA have been rejected in this Circuit. See Rendon, 354 F.3d at 1325 (citing United States v. Mena, 863, F.2d 1522, 1527 (11th Cir. 1989)) ("rejecting facial challenge to MDLEA based on lack of a 'meaningful relationship' to the United States").

authorities reveals that the courts have always distinguished between acts of piracy and other felonious conduct when examining Congress' power to regulate extraterritorially.

In United States v. Smith, *supra*, the Supreme Court, in determining whether a law punishing the crime of piracy was constitutionally enacted pursuant to Clause 10, distinguished between acts of piracy and other felonies, recognizing that Clause 10 granted Congress the power to define and punish *felonies* on the high seas, in addition to acts of piracy:

> But the power is also given 'to define and punish felonies on the high seas, and offences against the law of nations.' The term 'felonies,' has been supposed in the same work, not to have a very exact and determinate meaning in relation to offenses at the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations.

As early as 1820, therefore, the Supreme Court recognized that Clause 10 granted Congress the power to define and punish

felonious conduct committed on the high seas, apart from acts of piracy.

> In respect, therefore, as well to *felonies on the high seas* as to offences against the law of nations, *there is a peculiar fitness in giving the power to define as well as to punish;* and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.(emphasis added)

18 U.S. at 158; see also United States v. Suerte, *supra,*.

In Suerte, the Fifth Circuit reasoned:

> [ ] while at issue was Congress' power to define and punish *piracies*, Chief Justice Marshall's assessment should apply with equal weight to *felonies* such as at issue here, as parallel provision within the same constitutional clause. (discussing United States v. Palmer, 16 U.S. 610 (1818)

291 F.3d at 374.

Without question therefore, there has always been a historical distinction between piracy, which has been the subject of universal jurisdiction among nations, and non-piratical felonious conduct committed on the high seas, which has not been. See United States v. Furlong, 18 U.S. 184, 97 (1820)("Robbery on the high seas is considered as an offence within the

jurisdiction of all nations"..."Not so with the crime of murder,"). Congress did not, however, in enacting the MDLEA, denote drug trafficking as piracy, as it did in the Act of 1790, which the Supreme Court construed in Furlong.

The Act of the 30th of April, 1790 purported to punish anyone who committed murder on the high seas as an act of piracy, including foreigners while on board a foreign vessel. In United States v. Furlong, *supra*, the Supreme Court, in construing that act to determine whether it was authorized by Congress' power to punish, looked to the source of Congressional power to punish and the inherent nature of the offense charged in determining whether Congress' power to punish encompassed murder when committed on the high seas. "[W]e should test each case by a reference to the punishing powers of the body that enacted it." Furlong, 18 U.S. at 196.

In dicta, the Court found that Congress did not intend to criminalize crimes committed by foreign nationals on foreign vessels where there was no effect beyond the vessel. The Court's discussion, however, was limited by the express words of the act, which "declares murder as well as robbery to be piracy." In construing the act, the Court noted the "want of precision" in the wording of the act, particularly the lack of any distinction between the crimes of murder and piracy. The Court observed that the author "has blended all crimes punishable under the admiralty jurisdiction in the general term of piracy." Id. In apparent reference to Congress' power to define and punish piracy granted by Clause 10, the Court noted that piracy was

"within the acknowledged reach of the punishing power of Congress." Id. as 197.

The Court found problematic Congress' assertion that murder was an act of piracy:

> If by calling murder *piracy*, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same devise?[7]

Furlong does not, therefore, judicially restrict Congress' power to define and punish *any* felony committed on the high seas by foreingers on foreign vessels, as Defendants would have this Court conclude. Furlong simply determined, in the content of that particular statutory construction of the act of 1790, that Congress could not punish the crime of murder by calling it an act of piracy. Furlong did not address Congress' power to define and punish *felonies* on the high seas under Clause 10, since the act of 1790 did not purport to punish a felony committed on the high seas apart from an act of piracy.

Defendants' reading of Furlong is much too narrow. While instructive from a statutory construction perspecitve, its holding must be read with an appropriate historical perspective, particularly for what the holding did not say.

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[7] Similarly, in Palmer, the Court, construing the same act, found that robbery committed on the high seas on board a foreign vessel was not "piracy" "within the true intent and meaning of the act for the punishment of certain crimes against the United States," 16 U.S. at 633-34.

Singificantly, Furlong did not address the scope of extraterritorial congressional power under Clause 10. Its holding must accordingly be limited in precedential value.[8] Simply put, as the Government correctly argues, Furlong and Palmer, the cases on which Defendants so emphatically rely, are statutory construction cases rather than judicial limitations on Congress' Constitutional power to define and punish felonies on the high seas.

The plain language of Clause 10 empowers Congress to criminalize felonies on the high seas other than acts of piracy. Simply put, those cases which have upheld the MDLEA, with which this Court agrees, hold that drug trafficking on the high seas falls within any reasonable definition of "Piracies and Felonies," as that phrase is used in Clause 10. In this respect, Defendants' argument that Clause 10 does not give Congress the authority to define and punish "any conduct on the high seas, regardless of its lack of connection to the United States" and that only "piracies" can be punished without a national connection with the offender or vessel is overly simplistic and simply wrong. See United States v. Rendon, *supra*.

Offense Against Law of Nations

Alternatively, drug trafficking has been sufficiently condemned and outlawed on an

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[8] At least one court has questioned the continuing viability of Furlong, at least with respect to its seeming reliance on international law principles as support for its conclusion. See United States v. Suerte, 291 F.3d 366, 374 (5th Cir. 2002)("That position may be at loggerheads, however, with more recent pronouncements by the Court.")

international basis to constitute an "offense against the law of nations," within the meaning of Article 1, Section 8, Clause 10 of the United States Constitution. See Martinez-Hidalgo, 993 F.2d 1956 ("Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that is it "fundamentally unfair" for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.") Indeed, prior to enactment of the MDLEA, the Eleventh Circuit effectively proposed including drug trafficking as offenses against the law of nations within the meaning of Clause 10:

> There is a growing consensus among nations to include drug trafficking as a universally prohibited crime. See Single Convention on Narcotic Drugs, 18 U.S.Ts 1407 (1962)...
>
> It may well be that the time has arrived when the Congress of the United States should by appropriate legislation include drug trafficking in the same category as slave trafficking and piracy and authorize prosecution of drug trafficking on the high seas as offenses against the law of nations within the meaning of Article I, s. 8, Clause 10 of the United States Constitution. This will extend the criminal jurisdiction of the United States to all foreign vessels on the high seas that are engaged in drug trafficking.

United States v. Marino-Garcia, 679 F.2d 1373, n. 16 (11th Cir. 1982).

As the Eleventh Circuit suggested, the subsequent enactment of the current version of the MDLEA did criminalize drug trafficking on the high seas. In enacting the MDLEA, Congress found and declared in § 1902(a) that "trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned."[9]

Although not expressly addressing the scope of congressional authority under Clause 10, the Eleventh Circuit has recognized the international condemnation of drug trafficking on the high seas:

> In Gonzalez, we indicated that Congress has authority, under the 'protective principle' of international law, to regulate drug-related activities on the high seas because such activities have "a potentially adverse affect and [are] generally recognized as a crime by nations that have reasonably developed legal systems. (citations omitted) This is true, we noted, even absent consent or a

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[9] Dozens of Countries are parties to conventions condemning drug trafficking:

> Single Convention on Narcotic Drugs of 1961, as amended by 1972 protocol; Convention of Psychotropic Substances of 1971; 1982 United Nations Convention on the Law of the Sea; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

> waiver of consent from a foreign government. (citation omitted)

United States v. Tinoco, 304 F.3d 1088 at n. 21 (11th Cir. 2002) (citing United States v. Gonzalez, 776 F.2d 931, 939(11th Cir. 1985).

Defendants' contention that international drug trafficking is not recognized as a universal crime and threat to other nations and therefore Congress lacked authority to define and punish drug trafficking as an offense against the law of nations is unpersuasive, considering the international conventions, congressional findings incident to the enactment of the MDLEA and those cases which have discussed this issue in contemporary terms,[10] Accordingly, this Court concludes that the MDLEA was a constitutional exercise of congressional power pursuant to Article I, Section 8, Clause 10, as Congress had the authority to define and punich drug trafficking on the high seas as an offense against the law of nations.

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[10] The preamble to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, entered into force on November 11, 1990, references deep concern over "the magnitude and rising trend in the illicit traffic and other related organized criminal activities which undermine the legitimate economics and threaten the stability, security and sovereignty of States..." and " that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority." It expressed the "determination to improve international co-operation in the suppression if illicit traffic by sea" and "...that illicit eradication of illicit traffic is a collective responsibility of all states..." 28 I.L.M. 493, 497-98 (1989). In Article 17, the Convention expressly addresses "Illicit Traffic By Sea" and incorporate co-operative conditions for boarding vessels and seizing contraband on the high seas. Guatemala is a party to that Convention.

Accordingly Defendants' Joint Motion to Dismiss (Dkt. 101) is DENIED.

DONE AND ORDERED in chambers the 9th day of July, 2004.

JAMES D. WHITTEMORE
United States District Judge

CHAPTER 38. MARITIME DRUG LAW ENFORCEMENT

46 USCS Appx § 1903

§ 1903. Manufacture, distribution, or possession with intent to manufacture or distribute, a controlled substance on board vessels

(a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(b) For purposes of this section, a "vessel of the United States" means--

(1) a vessel documented under chapter 121 of title 46, United States Code [46 USCS §§ 12101 et seq.], or a vessel numbered as provided in chapter 123 of that title [46 USCS §§ 12301 et seq.];

(2) a vessel owned in whole or part by--

(A) the United States or a territory, commonwealth, or possession of the United States;

(B) a State or political subdivision thereof;

(C) a citizen or national of the United States; or

(D) a corporation created under the laws of the United States or any State, the District of Columbia, or any territory, commonwealth, or possession of the United States;

unless the vessel has been granted the

nationality of a foreign nation in accordance with article 5 of the 1958 Convention on the High Seas and a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was either sold to a person not a citizen of the United States or placed under foreign registry or a foreign flag, whether or not the vessel has been granted the nationality of a foreign nation.

(c)

(1) For purposes of this section, a "vessel subject to the jurisdiction of the United States" includes--

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel located within the customs waters of the United States;

(E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States; and

(F) a vessel located in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 [43 USCS § 1331 note], and (i) is entering the United

States, (ii) has departed the United States, or (iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under subparagraph (C) or (E) of this paragraph may be obtained by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of the Secretary of State or the Secretary's designee.

(2) For purposes of this section, a "vessel without nationality" includes--

(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed;

(B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

The response of a foreign nation to a claim of registry under subparagraph (A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of the Secretary of State or the Secretary's designee.

(3) For purposes of this section, a claim of nationality or registry only includes:

(A) possession on board the vessel and production of documents evidencing the vessel's nationality in accordance with article 5 of the 1958 Convention on the High Seas;

(B) flying its flag nation's ensign or flag; or

(C) a verbal claim of nationality or registry by the master or person in charge of the vessel.

(d) Any person charged with a violation of this section shall not have standing to raise the claim of failure to comply with international law as a basis for a defense. A claim of failure to comply with international law in the enforcement of this Act [46 USCS Appx §§ 1901 et seq.] may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act [46 USCS Appx §§ 1901 et seq.].

(e) This section does not apply to a common or contract carrier or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such a vessel who possesses or distributes a controlled substance in the lawful course of such person's duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negative the exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with respect to this exception is upon the person claiming its benefit.

(f) Any person who violates this section shall be tried in the United States district court at the

point of entry where that person enters the United States, or in the United States District Court of the District of Columbia. Jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense. All jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

(g)

(1) Any person who commits an offense defined in this section shall be punished in accordance with the penalties set forth in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 [21 U.S.C. 960].

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under this Act [46 USCS Appx §§ 1901 et seq.] shall be punished in accordance with the penalties set forth in section 1012 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 [21 U.S.C. 962] if such offense is a second or subsequent offense as defined in section 1012(b) of that Act [21 USCS § 962(b)].

(h) This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

(i) The definitions in the Comprehensive Drug Abuse Prevention and Control Act of 1970 [21 U.S.C. 802] apply to terms used in this Act.

(j) Any person who attempts or conspires to commit any offense defined in this Act [46 USCS Appx §§ 1901 et seq.] shall be subject to the same penalties as those prescribed for the

offense, the commission of which was the object of the attempt or conspiracy.

Supreme Court, U.S.
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No. 06-236

In the Supreme Court of the United States

OSCAR MANUEL GARCIA Y GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Maritime Drug Law Enforcement Act falls within Congress's constitutional authority under the High Seas Clause, Art. 1, § 8, Cl. 10.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the *Federal Reporter*, but is reprinted in 182 Fed. Appx. 873. The opinion of the district court (Pet. App. A8-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2006. The petition for a writ of certiorari was filed on August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing five kilograms or more of cocaine with the intent to distribute it, in violation of 46 U.S.C. App. 1903(a) and (g), and 21 U.S.C. 960(b)(1)(B)(ii). Pet. App. A2-A3. The district court sentenced petitioner to 168 months of imprisonment. *Id.* at A3. The court of appeals affirmed. *Id.* at A1-A7.

1. On March 7, 2004, a United States Coast Guard (USCG) team on board the USCG Cutter *Boutwell* intercepted F/V *El Almirante*, a vessel registered with Guatemala. The interception occurred in international waters approximately 250 miles off the coast of Costa Rica. The Coast Guard team made the interception because it had reason to believe that the *El Almirante* was on course to meet a Columbian-flagged vessel that was engaged in drug trafficking. After obtaining consent from the Government of Guatemala, the Coast Guard boarded the *El Almirante* and found more than 2500 kilograms of cocaine. Petitioner and several co-defendants were arrested on board. Petitioner was later identified as the captain of the *El Almirante*. Pet. 1-2; Pet. App. A2; PSR para. 9.

2. Petitioner and his co-defendants were charged with possessing five kilograms or more of cocaine with the intent to distribute it, and with conspiracy to commit the same offense, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. App. 1903(a) and (g), and 21 U.S.C. 960(b)(1)(B)(ii). The MDLEA makes it "unlawful for any person * * * on board a vessel subject to the jurisdiction of the United States * * * to knowingly * * * possess with intent to * * * distrib-

ute[] a controlled substance." 46 U.S.C. App. 1903(a). The term "vessel subject to the jurisdiction of the United States" is defined to include "a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. App. 1903(c)(1)(C).

In the district court, petitioner filed a motion to dismiss for lack of jurisdiction, arguing that the United States Constitution does not grant Congress the authority to criminalize conduct by foreign nationals aboard foreign vessels with no nexus to the United States. Pet. App. A2-A3. After the district court denied his motion, petitioner entered a conditional plea of guilty to the possession offense, preserving his right to appeal the court's denial of his motion to dismiss. *Id.* at A3. The district court sentenced petitioner to 168 months of imprisonment. *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A7. The court rejected petitioner's argument that the MDLEA is unconstitutional as applied to the drug trafficking conduct of foreign nationals on foreign vessels on the high seas where there has been no showing of a specific nexus between that conduct and the United States. *Id.* at A3-A7. The court held that the High Seas Clause, Art. 1, § 8, Cl. 10, authorizes Congress to forbid conduct that "has a potentially adverse effect" on the United States and that "is generally recognized as a crime by nations that have reasonably developed legal systems." Pet. App. A7. The court concluded that the MDLEA falls within that authority because "drug trafficking aboard vessels (1) 'is a serious international problem and is universally condemned' and (2) 'presents a specific threat to the security and societal well-being of the United States.'" *Ibid.* (quoting 46 U.S.C. App. 1902).

ARGUMENT

Petitioner contends (Pet. 5) that Congress may prohibit conduct under the High Seas Clause only if that conduct directly affects the United States' relations with foreign powers. Petitioner further contends (Pet. 11) that the MDLEA fails to satisfy that standard as applied to drug trafficking by a foreign national on a foreign vessel absent a showing that the drugs were destined for the United States. Petitioner's contentions are without merit and do not warrant review.

1. The High Seas Clause of the Constitution vests in Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. By its terms, the High Seas Clause authorizes Congress to punish any felony committed on the High Seas, without limitation. There is no requirement that the felony prohibited must have some demonstrated effect on the United States' relations with foreign powers. Nor is there any requirement that the felony prohibited must be one that, unless interrupted, would result in criminal conduct in the United States.

Furthermore, whatever the outer limits of Congress's power under the High Seas Clause, the MDLEA falls comfortably within that authority. As Congress found, drug trafficking aboard vessels in international waters is a serious international problem that is widely condemned by nations throughout the world and such trafficking presents a serious threat to the United States. 46 U.S.C. App. 1902. Moreover, the MDLEA applies to a foreign national aboard a vessel in international waters that is registered in a foreign nation only "where the flag nation has consented or waived objec-

tion to the enforcement of United States law by the United States." 46 U.S.C. App. 1903(c)(1)(C). In those circumstances, the MDLEA plainly falls within Congress's authority under the High Seas Clause.

Consistent with that understanding, every court of appeals that has considered the question has held that the MDLEA falls within Congress's authority under the High Seas Clause. *United States* v. *Estupinan*, 453 F.3d 1336, 1338-1339 (11th Cir. 2006) (rejecting claim that Congress exceeded its authority under the High Seas Clause in enacting the MDLEA); *United States* v. *Ledesma-Cuesta*, 347 F.3d 527, 531-532 (3d Cir. 2003) ("Congress had authority to enact [the MDLEA], pursuant to its constitutional power to: 'define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.'"); *United States* v. *Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2003) (rejecting defendants' contention that "drug-trafficking is not among the felonies and piracies on the high seas that Congress is empowered to define under Article I, Section 8, Clause 10 "), cert denied, 540 U.S. 1156 (2004). *United States* v. *Kurdyukov*, 48 Fed. Appx. 103 (5th Cir. 2002) (holding that the High Seas Clause permits application of the MDLEA to foreign nationals outside the United States territorial jurisdiction), cert. denied, 537 U.S. 1130 and 538 U.S. 909 (2003).

Petitioner's reliance (Pet. 12, 14) on *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) and *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820), is misplaced. Neither of those decisions involved constitutional interpretation of the High Seas Clause; they were concerned, instead, with statutory interpretation of Section 8 of a 1790 "act for the punishment of certain crimes against

the United States," which criminalized piratical murder. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113-114.

Indeed, although this Court in *Palmer* concluded that Congress had not intended the 1790 Act to extend to murder committed upon the high seas by one foreign crew member against another aboard a foreign vessel, the Court affirmed that Congress had authority under the High Seas Clause to prohibit such conduct. In framing the question before the Court, Chief Justice Marshall stated:

> The constitution having conferred on congress the power of defining and punishing piracy, *there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.* The only question is, has the legislature enacted such a law?

Palmer, 16 U.S. (3 Wheat.) at 630-631 (emphasis added).

That analysis applies equally to Congress's authority to punish felonies committed on the high seas. As the Fifth Circuit has explained in an opinion upholding the MDLEA as a valid exercise of Congress's authority under the High Seas Clause, "while at issue [in *Palmer*] was Congress' power to define and punish *piracies*, Chief Justice Marshall's assessment should apply with equal weight to *felonies* such as at issue here, a parallel provision within the same constitutional clause." *United States* v. *Suerte*, 291 F.3d 366, 374 (5th Cir. 2002).

2. Petitioner next contends (Pet. 19-21) that this Court's review is warranted to resolve a conflict in the circuits on whether due process requires a showing that conduct violating the MDLEA has a specific nexus to the

United States. Review of that question is not warranted in this case.

Four courts of appeals have correctly held that due process does not require a showing of such a nexus. See, *e.g.*, *United States* v. *Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004); *Suerte*, 291 F.3d at 372; *United States* v. *Cardales*, 168 F.3d 548 (1st Cir.), cert. denied, 528 U.S. 838 (1999); *United States* v. *Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994). As the Fifth Circuit explained in *Suerte*, 291 F.3d at 372, "'where the flag nation has consented or waived objection to the enforcement of United States law by the United States' * * * due process does not require a nexus for the MDLEA's extraterritorial application." And, as the Third Circuit stated in *Martinez-Hidalgo*, 993 F.2d at 1056, "[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas."

In *United States* v. *Perlaza*, 439 F.3d 1149, 1160 (2006), however, the Ninth Circuit held that "where the MDLEA is being applied extraterritorially * * * due process requires the Government to demonstrate that there exists a sufficient nexus between the conduct condemned and the United States such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant" (internal quotation marks and citation omitted). There is therefore a conflict in the circuits on that due process issue.

This case, however, is an inappropriate vehicle for resolving that conflict because petitioner did not raise a due process challenge to his conviction in the district

court or the court of appeals, and neither of those courts passed on that issue. This Court does not ordinarily review claims that were neither properly raised nor passed upon below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). There is no reason to depart from that practice here.

Moreover, because petitioner did not preserve a due process objection in the district court, such a claim could be reviewed only for plain error. See Fed. R. Crim. P. 52(b). *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). Under the plain error standard, a defendant must show that the alleged error committed by the district court is "obvious." *Id.* at 734. As discussed above, there is no merit to the argument that due process requires a showing of a specific nexus between the conduct prohibited by the MDLEA and the United States. At the very least, however, because there is no Supreme Court precedent supporting such a requirement and four circuits have rejected it, such a requirement could not possibly be "obvious." *United States* v. *Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) (no plain error given circuit split and absence of controlling Supreme Court precedent); *United States* v. *Williams*, 53 F.3d 769, 772 (6th Cir. 1995) (in general, a circuit conflict "precludes a finding of plain error"), cert. denied, 516 U.S. 1120 (1996).

3. Finally, petitioner argues (Pet. 22-24) that interpreting the High Seas Clause to authorize application of the MDLEA to foreign vessels without a specific nexus to the United States could have adverse effects on foreign policy. But Congress is entrusted with the responsibility to take into account the foreign policy implications of its exercises of authority under the High Seas Clause, and it has concluded that foreign policy is ad-

vanced rather than harmed by a prohibition on drug trafficking in international waters. It is for the political branches, not petitioner or the courts, to balance such foreign policy considerations. See *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) (rejecting claim that wire fraud prosecution should be barred to avoid "international friction:" "This action was brought by the Executive to enforce a statute passed by Congress. In our system of government the Executive * * * has ample authority and competence to manage the relations between the foreign state and its own citizens and to avoid embarrassing its neighbors. * * * The greater danger, in fact would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have neither aptitude, facilities nor responsibility to evaluate.") (internal quotation marks, citations, and brackets omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 06-236

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Oscar Manuel Garcia y Garcia, Petitioner

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United States of America, Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit

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United States of America, Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In his petition for certiorari, Mr. Garcia urged this Court to examine whether Article I of the Constitution provides Congress with carte blanche to criminalize whatever conduct committed by foreign nationals on foreign ships on the High Seas it chooses. Petitioner argued that such a reading of Article I, though linguistically possible, contravened the structure of Article I, its history, the writings of contemporary commentators, and the reasoning in early court decisions. Moreover, petitioner argued that, in light of the current disagreement among the courts of appeals as to Congress's power to criminalize conduct by foreign nationals on foreign ships, this Court should grant certiorari to provide guidance.

In response, the government argues that the plain language of Article I permits Congress to define and punish all felonies on the High Seas irrespective of nationality and flag of the vessel; that, in any event, Congress consistent with Article I can punish drug trafficking on the High Seas; that the split among the courts of appeals should not induce this Court to grant certiorari; and that the important foreign policy issues raised by Congress's broad exercise of authority should remain the province of the administration and Congress, not courts. None of the arguments are persuasive.

1. Construction of the High Seas Clause

The government argues that "the High Seas clause authorizes Congress to punish any felony committed on the High Seas without limitation," opp. at 4, and continues that "[t]here is no requirement that the felony prohibited must have some demonstrated effect on the United States' relations with foreign powers." *Id.* To support that expansive view, the government cites only the text of the High Seas Clause itself.

The government's plain language argument ignores the very structure of the constitutional clause it interprets. Petitioner in his opening brief argued that such a plain meaning approach would render Congress's correlative powers to define and punish "Piracies" and "Offences against the Law of Nations" superfluous. All "piracies" and "offences against the Law of Nations" can be defined as felonies. The government does not even suggest a response.

Moreover, the government's interpretation is ahistorical. Influential commentators at the time of the Founding wrote that the Constitution vested in Congress only the power to define and

punish felonies that interfered with the United States' relations with foreign powers. Madison, for instance, asserted that the purpose of the Clause was to "regulat[e] the intercourse with foreign nations,"[1] and William Rawle wrote soon after in his constitutional treatise that Congress under the High Seas Clause could not punish "the citizens or subjects of a foreign state sailing under its flag."[2] Indeed, our nation's very history confirms those commentators' views, because it would have been unthinkable for the Constitution of the fledgling nation to have authorized Congress to punish transgressions on French, British, or Spanish ships that had no connection to the United States. The surrounding constitutional provisions provided Congress with the means to *prevent* embroiling the new nation into international conflict, not to impose whatever norms it wished to extraterritorially.

Furthermore, the government has no comment on the long tradition in Great Britain, the dominant sea power of the day, disclaiming the power to exercise jurisdiction over crimes on the High Seas committed by foreign nationals on foreign ships. In explicating the "limits of the legislative power of this country and of the jurisdiction of its Courts" in *Queen v. Keyn*, 1876 L.R. 2ex. D. 63, 89, Lord Lindley summarized the prevailing view that "[n]o state has any power to legislate save over its own subjects and over persons on board ships carrying its flag."

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[1] *The Federalist* No. 42 [James Madison] 264 (New American Library 1961).

[2] William Rawle, *A View of the Constitution of the United States* 106-09 (2d ed., Philadelphia 1929).

With respect to precedent in our own nation, the government only pays lip service to the reasoning in this Court's early discussion of the High Seas Clause. It relies on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), for the proposition that "there can be no doubt of the right of the legislature to enact laws punishing pirates." Opp. at 6 (citing *Palmer*, 16 U.S. at 630-31). Petitioner of course agrees that Congress has the power to punish *piracy*; the question rather is whether the Constitution vests Congress with the power to define any *felony* it wishes to and punish that conduct on the High Seas. In that respect, Chief Justice Marshall's opinion in *Palmer* is telling, for he asserted that "it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government . . . These are offenses against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." *Id.* at 632. And, in *United States v. Furlong*, 18 U.S. 184 (1820), this Court cautioned against interpreting statutes to cover the conduct of foreigners on foreign vessels for "if, by calling murder piracy, [Congress] might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by that same device?" *Id.* at 198. *Palmer* and *Furlong* plainly evince the understanding of the time that the Constitution limited Congress's power under the High Seas Clause to define only felonies that threatened the United States' relations with foreign powers.

Finally, the government suggests that, even if its broad construction of the High Seas

Clause violates Article I, "the MDLEA falls comfortably within that authority," opp. 4, both because of the international opprobrium toward drug trafficking and because of the consent of the foreign flag vessel. Although drug trafficking is widely condemned so is murder, assault, IP fraud, and a host of other anti-social conduct. The Constitution vests Congress with the power in the High Seas Clause to protect the United States's relations with foreign powers, not to pick and choose among felonies that nations abhor. Moreover, the consent of the flag state is not relevant: the Constitution does not vest in Congress the power to act as a world policeman and apply U.S. law to foreign nationals outside our borders when a foreign state concurs. Otherwise the theory of enumerated powers would crumble whenever a state, locality, or foreign national would agree to congressional regulation that would otherwise fall outside of Article I.

2. Disagreement Among the Lower Courts

The government concedes (opp. at 7) that the Ninth Circuit in *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006), disagreed with the approach of the court below in holding that the government must show a sufficient nexus between the conduct condemned and the United States – a showing not attempted here -- to permit a MDLEA prosecution to proceed. It argues, however, that this Court should deny certiorari because petitioner's claim focused on the ambit of the High Seas Clause itself as opposed to the Due Process Clause. The Ninth Circuit's decision in *Perlaza*, however, only highlights the need for this Court to provide guidance to the courts below, and the

disagreement among the lower courts is far deeper than suggested by the government.

As an initial matter, the Ninth Circuit recently reaffirmed its reasoning in *Perlaza* in *United States v. Zakharov*, 2006 U.S. App. LEXIS 28203 (Nov. 15, 2006): "we require a sufficient nexus between the United States and the defendant's activities before exerting jurisdiction over foreign vessels." *Perlaza*'s due process reasoning is the mirror image of the Article I argument raised below – because Congress lacked the authority to vest jurisdiction in the federal courts over the conduct charged, petitioner's due process rights were violated.

More importantly, the government ignores that a number of courts of appeals under the MDLEA's predecessor statute required such a nexus. For instance, the Second Circuit in *United States v. Pinto-Mejia*, 728 F.2d 248, 260 (2d Cir. 1983), stated that, under international law principles woven into the statute, nexus was required before prosecuting a foreign national on a foreign ship, and the district court in *United States v. Greer*, 956 F. Supp. 531 (D. Vt. 1997), followed that approach in holding that it would require a nexus for any MDLEA prosecution. Thus, in light of the disarray among the lower courts, this Court should grant certiorari.

3. Importance of the Constitutional Issue

In his petition, Mr. Garcia argued that the constitutional issue was of utmost importance because it thrust the United States into the role of a global policeman and invited other countries to assert their own law against United States nationals apprehended on the High Seas. In response, the government argues (opp. at 9) that it "is for the political branches, not petitioner or the courts, to balance such foreign policy

considerations." Petitioner agrees that it is up to the political branches to determine the *wisdom* of the MDLEA. Yet, it remains the province of this Court to determine the importance of the constitutional issue in the case. The very importance of the issue led prior courts to opine that the Framers of the Constitution would not have wished to grant Congress the unfettered power to determine which conduct by foreign nationals on foreign ships to criminalize. As the court in *United States v. Kessler*, No. 15,528 (C.C.D. Pa. 1829), warned long ago, "It is easy to see that this might get us into difficulties with other nations . . Questions and difficulties of this sort are avoided by confining our cognizance of offenses on the high seas to our own ships, leaving other nations to take care of their own." *Id.* at 774. And, the United States has protested to other countries when they have asserted jurisdiction over our citizens.[3] Moreover, as Justice Johnson admonished in *Palmer*, "Congress cannot make piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses." 16 U.S. at 641-42. Yet, according to the government, Congress can do just that as long as it labels the conduct a felony. Thus, the importance of the constitutional issue raised militates for review by this Court.

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[3] *See US presses Belgium over law on pursuing foreigners: report, Agence France-Press, Jan. 11, 2003; Cutting's Case*, 2 Moore, Digest of International Law 228-42 (1906).

CONCLUSION

For the foregoing reasons, as well as for those in the petition. Mr. Garcia requests this Court to grant the petition for certiorari.

Respectfully submitted,

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